

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(44)S
Sales Tax
September 22, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S100623A

On June 23, 2010, the Department of Taxation and Finance received a Petition for Advisory Opinion from [REDACTED]. The petition asks whether any portion of the price Petitioner paid for prewritten software is subject to New York State sales and use taxes.

We conclude that the portion of the price attributable to users located in New York is subject to sales and use tax.

Facts

Petitioner's parent, [REDACTED] (GL), is a global provider of assurance, consulting and classification services to the maritime and energy industries and is headquartered in Hamburg, Foreign Country 1. GL has approximately 6,700 employees in 80 countries. Most of GL's employees are located in Foreign Country 1 and the Foreign Country 2. GL owns several subsidiaries in the US, including petitioner, which maintains its offices in New York. Petitioner, and U.S. affiliates of petitioner, collectively have approximately 250 employees in the U.S., including approximately 18 employees in New York State. The remaining US employees are located primarily in Texas, Florida, and California.

Petitioner has entered into a three-year license agreement with a software company located in Nevada (Company X). The license agreement provides for approximately 3,000 copies of Company X's prewritten software to be used by GL, Petitioner, and other subsidiaries of GL worldwide. Approximately 2,750 of these employees/users will be located in [REDACTED] (Foreign Country 1) and [REDACTED] (Foreign Country 2); and approximately 250 users will be located in the US (primarily in Texas).

The agreement with Company X is countersigned by Petitioner, with its corporate address in New York listed as the "invoice to," "bill to" and "ship to" address for invoicing and other purposes. The authorized number of licensed copies of the software are made available to petitioner for download from Company X's servers. The use of the software licenses will effectively be maintained and administered by GL's personnel in Foreign Country 1 on behalf of Petitioner.

The employees of GL, Petitioner, and other subsidiaries of GL located worldwide will be able to access the software as needed, using a code or key provided to them over the internet by the administrators in Foreign Country 1. GL's administrators will be able to track usage according to the license agreement, and GL will be able to provide data, if required, to show that users in Foreign Country 1 or the Foreign Country 2 are in fact physically located in Foreign Country 1 or the Foreign Country 2. Petitioner will not charge its affiliates for the right to use the prewritten software provided by Company X.

Company X believes it is obligated to bill Petitioner New York sales tax on the total number of licenses provided for in the agreement based on Petitioner's New York address in the license agreement and as the "invoice to," "bill to," and "ship to" address.

Analysis

Prewritten software is considered tangible personal property “regardless of the means by which it conveyed to a purchaser” (Tax Law section 1101[b]6). Retail sales of tangible personal property are subject to sales tax (Tax Law section 1105[a]). A sale includes “[a]ny transfer of title or possession or both” and includes a “license to use.” Sales Tax Regulation section 526.7(e) provides that, in general, “a sale is taxable at the place where the tangible personal property or service is delivered or the point at which possession is transferred by the vendor to the purchaser or his designee.” Sales Tax Regulation section 526.7(e)(4) further provides that, with respect to a “license to use,” a transfer of possession has occurred if the customer obtains actual or constructive possession, or if there has been “a transfer of the right to use, or control or direct the use of tangible personal property.” “[C]onstructive possession” of software or “the right to use, or control” software for purposes of Regulation section 526.7(e)(4) is determined based on the location where the client uses or directs the use of the software and not on the location of the code embodying the software (TSB-A-08[62]S).

Accordingly, Company X should situs its sales of prewritten software to Petitioner based on the location of the employees who use the software. Because the employees of Petitioner and its affiliates who use the software are located both in and outside of New York State, Company X should collect tax based on the portion of the receipt attributable to the employee users located in New York. (See TSB-A-03[5]S; Tax Law section 1142[4]). As described in that Advisory Opinion, Company X may rely on information received from Petitioner to determine the location of the employee users.

DATED: September 22, 2010

/S/

DANIEL SMIRLOCK
Deputy Commissioner and Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.